(3)

No. 97-1235

In The

Supreme Court of the United States

October Term, 1997

CITY OF MONTEREY,

Petitioner,

v.

DEL MONTE DUNES AT MONTEREY, LTD., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO AS AMICUS CURIAE SUPPORTING PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF AMICUS CURIAE

Under Supreme Court Rule 37.4, amicus curiae City and County of San Francisco, joined by the 84 California cities and counties identified below ("the cities"), submit this brief in support of the petition for a writ of certiorari by the City of Monterey.[1] This case involves the traditional right of a regulatory government agency to a trial by the court, rather than by a jury, to determine the agency's liability for a taking under the Fifth Amendment to the U.S. Constitution. The Ninth Circuit Court of Appeals held that a jury may decide the liability of a city for a taking. Each of the cities is within the jurisdiction of the Ninth Circuit, and is therefore subject to that court's decision in this case. Because the availability of a jury in inverse condemnation cases could have large implications

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[1] The following California public entities join in this brief: the cities of Alameda, Albany, Bakersfield, Berkeley, Bradbury, Burbank, Capitola, Carson, Chula Vista, Claremont, Clayton, Colma, Corte Madera, Cotati, Del Rey Oaks, Dinuba, El Cajon, El Centro, Escondido, Eureka, Fortuna, Garden Grove, Glendale, Huron, Imperial Beach, Lafayette, Laguna Beach, Long Beach, Los Altos, Los Angeles, Madera, Marina, Merced, Montclair, Montebello, Morgan Hill, Novato, Oceanside, Ontario, Orange Cove, Palm Desert, Pico Rivera, Piedmont, Pleasant Hill, Poway, Redding, Rialto, Roseville, Ross, Sacramento, San Anselmo, San Bruno, San Buenaventura, San Diego, San Juan Capistrano, San Luis Obispo, San Mateo, San Pablo, San Rafael, Santa Clara, Santa Maria, Santa Rosa, Sunnyvale, Thousand Oaks, Tiburon, Trinidad, Truckee, Tulare, Vacaville, Vista, Walnut, Wasco, and Yreka; the counties of Butte, Contra Costa, Glenn, Lake, Napa, Riverside, San Diego, Santa Barbara, Santa Cruz, Tulare, and Tuolumne.

for local governments, this Court should consider the cities' viewpoint in this brief.

INTRODUCTION

In *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, for the first time, the Ninth Circuit held that a plaintiff is entitled to a jury trial in inverse condemnation cases. In so holding, the Ninth Circuit miscontrued the controlling precedent of this Court.

In *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 245 (1897), this Court held that there is no right to a jury trial for cases under the Takings Clause of the Fifth Amendment. At the time of this Court's decision, the application of the Takings Clause was limited to eminent domain, namely, the government's physical appropriation of land, also known as direct condemnation. Since that time, however, the application of the Takings Clause has been expanded to inverse condemnation, namely, property owners' suits from indirect takings resulting from government regulation of land use. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 122 n. 25 (1978).

This Court has made clear that both direct and inverse condemnation actions arise under the Takings Clause of the Fifth Amendment. *Jacobs v. United States*, 290 U.S. 13, 16 (1933). Thus, the same rules regarding the right to a jury trial apply to both. Review by this Court is necessary to correct the Ninth Circuit's deviation from this Court's precedent in this important area of the law.

Review by this Court is also necessary because the Ninth Circuit's novel conclusion that an aggrieved property owner is entitled to a jury trial in an inverse condemnation proceeding directly conflicts with the only other circuit court decision addressing this issue. In *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2514, 138 L.Ed.2d 1016 (1997), the Eleventh Circuit correctly decided that a property owner is not entitled to a jury to determine liability for inverse condemnation. This Court should grant certiorari to resolve the conflict between the circuit courts.

The petition for certiorari should be granted.

STATEMENT OF THE CASE

The property at issue consists of approximately 37 acres overlooking the Pacific Ocean in the City of Monterey, California (City). Beginning in 1981, the owner of the property, Ponderosa Homes, made several unsuccessful attempts to develop the property with houses.

While Ponderosa's last application to build 190 homes was pending with the City, respondent Del Monte Dunes at Monterey, Ltd. and Monterey-Del Monte Dunes Corporation (Del Monte) purchased the property and pursued the application. In 1986, the City denied Del Monte's application.

Del Monte brought an action in the district court against the City for inverse condemnation, violations of its due process and equal protection rights, estoppel, and unjust enrichment. The district court held that Del

Monte's constitutional claims were not ripe for review and dismissed. The Ninth Circuit reversed, finding that the constitutional claims were ripe for adjudication. *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1506 (9th Cir. 1990).

On remand, over the objection of the City, the district court ordered the inverse condemnation and equal protection claims tried by a jury. The district court instructed the jury that it could find the City liable for inverse condemnation if there was no "reasonable relationship" between the City's denial of Del Monte's project and a legitimate public purpose. After a trial, the jury found that the City was liable to Del Monte for inverse condemnation and for a violation of Del Monte's equal protection rights. The jury awarded Del Monte $1,450,000 in damages.[2] The Ninth Circuit affirmed. *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *reh'g granted*, 118 F.3d 660, 661 (9th Cir. 1997), *reaff'd on reh'g*, ___ F.3d ___ (9th Cir. 1997), Appendix to Petition for Writ of Certiorari (App.).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In its petition for a writ of certiorari, the City of Monterey states two reasons for granting the petition:

[2] Amici cities and counties do not dispute that once liability for inverse condemnation has been established, the question of damages should be tried to a jury. *See New Port Largo*, 95 F.3d at 1092; *Mid Gulf, Inc. v. Bishop*, 792 F. Supp. 1205, 1215 (D. Kan. 1992); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 771 F. Supp. 911, 913 (N.D. Ill. 1991).

1) the Ninth Circuit erred in allowing a jury trial on the City's liability for inverse condemnation; and 2) the Ninth Circuit improperly instructed the jury on the standard of review of the City's decision to deny Del Monte's project. Because the resolution of the second issue is unnecessary to the ultimate result in this case, San Francisco and amici cities and counties request review on the first ground only. If this Court reverses the Ninth Circuit's decision on the ground that a jury is not permitted to adjudicate liability for inverse condemnation, the Court would remand the case for a court trial.

I. REVIEW BY THIS COURT IS NECESSARY BECAUSE THE NINTH CIRCUIT MISCONSTRUED CONTROLLING PRECEDENT OF THIS COURT ON AN IMPORTANT QUESTION OF FEDERAL LAW.

Rule 10 of the Supreme Court provides that review on a writ of certiorari is appropriate when "a United States court of appeals has decided an important question of federal law . . . in a way in conflict with applicable decisions" of the Supreme Court. *See Foucha v. Louisiana*, 504 U.S. 71, 75 (1992) ("Because the case presents an important issue and was decided by the court below in a manner arguably at odds with prior decisions of this Court, we granted certiorari."); *United States v. Doe*, 465 U.S. 506, 610 (1984) ("We granted certiorari to resolve the apparent conflict between the Court of Appeals' holding and the reasoning underlying this Court's holding in *Fisher*."). By allowing Del Monte's inverse condemnation claim to be tried before a jury, the Ninth Circuit misconstrued controlling precedent of this Court.

A. There Is No Right To A Jury In Cases Arising Under the Takings Clause.

Inverse condemnation cases arise directly out of the self-executing character of the Takings Clause of the Fifth Amendment. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315-17 (1987), *citing United States v. Clarke*, 445 U.S. 253, 257 (1980). Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *United States v. Clarke*, 445 U.S. at 257. Inverse condemnation differs from direct condemnation (eminent domain) only insofar as the action is initiated by the property owner. *See First English*, 482 U.S. at 315-17; *Agins v. City Tiburon*, 447 U.S. 255, 258 n. 2 (1980). This Court long ago acknowledged that direct and inverse condemnation stem from the same basic right: "The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment." *Jacobs v. United States*, 290 U.S. at 16.

The right to a jury trial for claims under the U.S. Constitution is determined by the Seventh Amendment. The Seventh Amendment provides: "In suits at common law, . . . the right of trial by jury shall be preserved." The Ninth Circuit determined that because an inverse condemnation action is a suit "at common law," Del Monte

was entitled to a jury under the Seventh Amendment. But this Court has held that the Seventh Amendment merely "preserves" the right to a jury for actions for which a right to jury trial existed in 1791 when the Seventh Amendment was ratified. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, ___, 116 S.Ct. 1384, 1389, 134 L.Ed.2d 577 (1996); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40-42 (1989); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 459-60 (1977).

When this Court first applied the Takings Clause to the States, the Court confirmed that no right to a jury trial existed for condemnation in 1791:

> [B]efore the establishment of the government of the United States[,] it had been the practice in this country and in England to ascertain by commissioners, special tribunals and other like agencies, the compensation to be made to owners of private property taken for public use, and it was not to be supposed that the general provisions in American constitutions, national and state, preserving the right of trial by jury, superseded that practice. [citation omitted.]

Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. at 245; *see also Atlas Roofing Co.*, 430 U.S. at 458; *United States v. Reynolds*, 397 U.S. 14, 18 (1970) ("[I]t has long been settled that there is no constitutional right to a jury in eminent domain proceedings."), *citing Bauman v. Ross*, 167 U.S. 548, 593 (1897) (estimate of just compensation for property taken under right of eminent domain is not required to be made by a jury) and 5 *Moore's Fed'l Prac.*, @ 38.32(1) at 239 (2d ed. 1969) (practical and jurisprudential history both before and after 1791 lead to conclusion that there is no constitutional right to jury trial in federal courts for condemnation

actions); 8 *Moore's Fed'l Prac.*, @ 38.33(4)(a) at 125 (3d ed. 1997) (no right to jury trial existed for takings in 1791).

Accordingly, because inverse condemnation actions are premised on the Takings Clause, and there is no right to a jury in direct condemnation actions, inverse condemnation actions also do not invoke the right to a jury trial. *See New Port Largo, Inc.*, 95 F.3d at 1092; *c.f. Department of Agri. & Consum. Svcs. v. Bonanno*, 568 So.2d 24, 28 (Fla. 1990) (no right to jury trial for inverse condemnation under Florida Constitution because no right to jury trial for condemnation at common law). The Eleventh Circuit adopted this view: "We have discovered no indication that the rule in regulatory takings cases differs from the general eminent domain framework, in which issues pertaining to whether a taking has occurred are for the court, while damages issues are the province of the jury." *New Port Largo, Inc. v. Monroe County*, 95 F.3d at 1092.[5]

To find a right to a jury in an inverse condemnation case, the Ninth Circuit attempted to distinguish the rule in direct condemnation cases. Without authority, the Court reasoned that direct condemnation proceedings are not tried before a jury because the United States traditionally is a party. App. 8 (citing commentary and case

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[5] The only other federal courts to address the issue of the right to trial by jury in an inverse condemnation case agreed with the Eleventh Circuit. *See Mid Gulf, Inc. v. Bishop*, 792 F. Supp. at 1216 (liability for inverse condemnation raises question of law to be determined by the court); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 771 F. Supp. at 913 (liability for inverse condemnation presented question for the court).

law relating to Federal government's waiver of sovereign immunity to jury trial for inverse condemnation). But as shown above, the rule precluding a jury in condemnation actions is rooted in the consistent practice of our country before adoption of the Seventh Amendment. *See Chicago, B. & Q. R. Co.*, 166 U.S. at 245; *Atlas Roofing Co.*, 430 U.S. at 458; *United States v. Reynolds*, 397 U.S. at 18; *Bauman v. Ross*, 167 U.S. at 593; 8 *Moore's Fed'l Prac.*, @ 38.33(4)(a) at 125.

The Ninth Circuit found a right to a jury on the liability issue because Del Monte's inverse condemnation claim raised mixed questions of fact and law, and Del Monte sought a damages remedy. App. 11-15. The former reason is not relevant to the jury issue; direct condemnation cases also raise mixed questions of law and fact. *See, e.g., United States v. 21.54 Acres of Land*, 491 F.2d 301, 306-07 (4th Cir. 1973). Yet, as demonstrated above, the unanimous and long-standing rule of this Court precludes juries in direct condemnation cases under the Fifth Amendment. As the Supreme Court stated in *Atlas Roofing Co.*: "The point is that the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases." 430 U.S. at 460. The latter reason also is not relevant to whether the liability issue should be decided by a jury; courts have consistently treated liability for inverse condemnation differently from damages.[6]

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[6] If a court finds that the government is liable for inverse condemnation, a jury determines just compensation. *See infra* p. 2 and footnote 2.

The Ninth Circuit also found a right to a jury because inverse condemnation actions are actions "at law" rather than suits "in equity." App. 7-9. This logic fails. Direct condemnation also is a right at law; it is not a right in equity, nor a creature of statute. *Atlas Roofing Co.*, 30 U.S. at 458, *citing Kohl v. United States*, 91 U.S. 367, 375-76 (1876) (Judiciary Act of 1789 conferred upon circuit courts jurisdiction over condemnation actions). Yet, direct condemnation claims have never included a right to jury trial. *Id.*

B. Section 1983 Does Not Create A Right To A Jury.

The Ninth Circuit erroneously assumed that a plaintiff in an inverse condemnation action is entitled to a jury trial because an inverse condemnation action against a local government agency is brought under 42 U.S.C. Section 1983. App. 7-10. The Ninth Circuit's reliance on Section 1983 is misplaced.

Whether a jury is available in an action brought under Section 1983 turns on whether a jury is available for infringement of the underlying constitutional right. *See Albright v. Oliver*, 510 U.S. 266, 271 (1994) (citing *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) and *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (Section 1983 purely a remedy for violation of other federal rights; Section 1983 not a source of substantive rights); *see also Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979) (Civil Rights Act of 1871 provides merely a remedy, not any substantive rights); *but see Cook v. Cox*, 357 F. Supp. 120, 123-25 (E.D. Va. 1973) (Section 1983 creates separate federal right that implicates right to jury trial).

As demonstrated above, there is no constitutional right to a jury in a takings case. Section 1983 does not create such a right.[7]

The Ninth Circuit relied on *Lorillard v. Pons*, 434 U.S. 575 (1978), for the proposition that Section 1983 confers a right to a jury. However, in *Lorillard*, the underlying right the plaintiff sought to enforce originated with the Age Discrimination in Employment Act of 1967 (ADEA). This Court found that in creating a new legal right under the ADEA, Congress intended to incorporate the right to a jury trial that existed for enforcement of similar federal statutes as of 1967. 434 U.S. at 581, 584. Thus, it is wholly consistent with the Seventh Amendment to allow a jury in an action for violation of a right created by Congress after 1791.

The Ninth Circuit rule would also produce anomalous results. A property owner cannot sue a state under Section 1983. *Arizonans for Official English v. Arizona*, ___ U.S. ___, 117 S.Ct. 1055, 1069, 137 L.Ed.2d 170 (1997); *Quern v. Jordan*, 440 U.S. 332, 338-41 (1979). Actions for inverse condemnation against a state government are brought directly under the Fifth Amendment. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1006 (1992). Accordingly, under the Ninth Circuit rule, a property owner would have a constitutional right to a jury in an inverse condemnation case in federal court against a

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[7] The predecessor statute to Section 1983 was enacted in 1871. At the time of its enactment, there was no right to a jury trial for condemnation actions because there was no right to a jury trial for such actions in 1791. *See infra* pp. 7-8. The mere enactment of Section 1983 did not create the right to a jury trial for claims for which no such right existed in 1871.

local public entity, *see Monell v. Dept. of Soc. Svcs.*, 436 U.S. 658, 690 (1978), but not against a state entity.

The Ninth Circuit also misconstrued a takings action as a type of common-law tort, such as trespass. The Ninth Circuit relied on *Beatty v. United States*, 203 F. 620, 626 (4th Cir. 1913), *writ of error dismissed and cert. denied*, 232 U.S. 463 (1914) (appeal denied because order not final) for the proposition that inverse condemnation is similar to trespass. However, the Fourth Circuit overruled *Beatty* by implication in *United States v. 21.54 Acres of Land*, 491 F.2d at 306-07 (trial judge had jurisdiction to find facts relative to takings claim) and *Atlantic Seaboard Corp. v. Van Sterkenburg*, 318 F.2d 455, 459 (4th Cir. 1963) ("there is no absolute right to a jury trial on the issue of just compensation in condemnation cases.").

An inverse condemnation claim is not analogous to common-law torts like trespass. In cases of trespass and other common-law torts, the plaintiff sues the defendant for damages for a wrong committed by the defendant. In contrast, under the Takings Clause, the taking is not considered a wrong or an injury as long as the government pays compensation. *See Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 194 (1985). The framers intended the Takings Clause only to apportion the burdens of public projects between the individual and the public as a whole. *Agins v. City of Tiburon*, 447 U.S. at 260 (taking is determination that public at large rather than single owner must bear burden of state's action); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (Takings Clause "designed to bar Government from forcing some people alone to bear public burdens"), *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945) (Takings Clause redistributes economic losses inflicted by

public improvements so they fall upon public rather than those happening to lie in path of project).

II. REVIEW BY THIS COURT IS NECESSARY TO SECURE UNIFORMITY OF DECISION AMONG THE CIRCUIT COURTS.

Rule 10 of the Supreme Court provides that review on a writ of certiorari is also appropriate when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." According to one commentator: "One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on [questions of federal law] among the federal courts of appeals. Hence a square and irreconcilable conflict . . . *ordinarily* should be enough to secure review." Stern, *et al.*, *Supreme Court Practice*, 169 (7th Ed. 1993) (emphasis in original); *see, e.g.*, *United States v. Burke*, 504 U.S. 229, 233 (1992) ("We granted certiorari to resolve a conflict among the Courts of Appeals concerning the exclusion of Title VII backpay awards from gross income"); *United States v. Lorenzetti*, 467 U.S. 167, 173 (1984) (certiorari granted to review Third Circuit opinion that recognized that its interpretation of a statute was "squarely inconsistent" with Sixth Circuit's); *McElroy v. United States*, 455 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the Circuits on this issue of statutory construction").

The decision of the Ninth Circuit conflicts directly with a decision of another circuit court. App. 7-15. In *New Port Largo*, a landowner sued the county for inverse condemnation, alleging that the county's rezoning of the

property from residential to airport use constituted a regulatory taking under the Fifth Amendment. The trial court rejected the landowner's claim that a jury should decide "subsidiary facts" raised by the takings claim. The Eleventh Circuit affirmed, holding that "no jury had to be empaneled for the regulatory takings claim." 95 F.3d at 1092.[8]

This Court should not defer resolution of the conflict. For two reasons, the only means to effectively resolve the conflict is by immediate review by this Court. First, both circuit courts stated their holdings in unequivocal, unqualified terms. Accordingly, there is no room for modification of either position in future decisions.[9] Second, because the right to a jury trial is controlled by the Seventh Amendment and historical fact, there is no prospect for a legislative resolution of this conflict.

In addition, unless the Court grants review, the conflict will undoubtedly cause confusion in the circuits that have not addressed this jury issue. If circuits adopt the

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[8] The Eleventh Circuit's position is consistent with the rule prevailing in the great majority of the 50 states. *See, e.g., Hensler v. City of Glendale*, 8 Cal.4th 1, 15 (1994). Accordingly, the Ninth Circuit rule would promote forum shopping between the federal and state courts.

[9] The opinion in *New Port Largo* was filed on September 25, 1996, 12 days after the filing of *Del Monte Dunes*. On August 6, 1997, the Ninth Circuit heard oral argument on rehearing in *Del Monte Dunes*. (Appendix 47 incorrectly states the date of oral argument as August 6, 1996.) On October 28, 1997, the Ninth Circuit filed its Order declining to amend its opinion and rejected rehearing *en banc*. The Ninth Circuit's failure to distinguish or to reconcile its decision with *New Port Largo* demonstrates that the two decisions cannot be reconciled.

Ninth Circuit rule, cases tried to a jury before resolution of the issue by this Court may require retrial. The interests of justice and judicial economy require a prompt and definitive resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

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